

***United States Court of Appeals
for the Second Circuit***



APPENDIX

B
P/S

76-1305

IN THE
United States Court of Appeals
For the Second Circuit

No. 76-1305

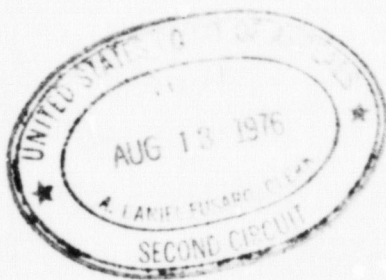
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
against
ANDREW CAVITOLO,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

JOINT APPENDIX

LA ROSSA, SHARGEL & FISCHETTI
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DOCKET ENTRIES

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
THE UNITED STATES,

vs.

JUDD, J.

75 CR 261

ANDREW CAVITOLO, a/k/a "Andy Zac"
Cavitolo, ANTHONY DE FILIPPO, JOEL
RAKOFISKY, PALMA "PAT" LOMBARDI.
-----X

PROCEEDINGS

4- 2-75	Before Platt, J. - Indictment filed.
4-10-75	Notice of Appearance filed (deft. CAVITOLO).
4-10-75	Notice of Appearance filed (deft. De FILIPPO).
4-10-75	Notice of Apperance filed (deft. RAKOFISKY).
5-10-75	Notice of motion to dismiss (R-50(b)) filed ret. 5/23/75 and Memorandum of law filed (CAVITOLO and DE FILIPPO).
5-23-75	Before Judd, J. - Case called - Adj. to 5/30/75. (deft A. Cavitolo's motion to dis- miss the indictment, etc.)
5-28-75	Govt's reply to defts motion to dismiss indictment.
5-30-75	Before Judd, J. - Case called & adj. to June 6, 1975 at 2:00 P.M.
6- 6-76	Before Judd, J. - Case called - counsel pre- sent - hearing begun on deft's motion to dis- miss - hearing concluded - decision reserved.

6- 9-75 Stenographers Transcript dated 6/6/75 filed.

7- 1-75 By Judd, J. - Memorandum and Order filed denying motion for dismissal of the Indictment (Cavitolo & De Filippo).

7- 8-75 Notice of readiness for trial filed.

7-24-75 74 M 1387 is inserted in CR filed.

10-3-75 Before Judd, J. - Case called - Defts not present - all counsel present - conference held and concluded - case adjd. to 12/8/75 at 10:00 A.M. for trial.

11-7-75 Before Judd, J. - Case called - defts not present - defts motions for adjournment of trial date - motion granted on consent - case adjd. to 2-9-76 for trial.

2-9-76 Before Judd, J. - Case called - adjd. to 2-10-76 at 10 A.M. for trial.

2-10-76 Before Judd, J. - Case called - defts present - counsel for deft DE FILLIPO still sick - case adjd. to 2-11-76 for trial.

2-11-76 Stenographers transcript filed dated 2-10-76.

2-11-76 Before Judd, J. - Case called - defts & attys present - trial ordered and BEGUN - Jurors selected and sworn - trial cont'd. to 2-17-76.

2-13-76 Before JUDD, J. - Case called - Deft ANTHONY De FILLIPPO (sic) and counsel present - deft after being advised of his rights by the court and on his own behalf enters a plea of guilty to count 1 - bail contd - case adjd without date for sentencing.

2-17-76 Before Judd, J. - Case called - defts & attys present - trial resumed - Govt opens - all defts open - trial contd to 2-18-76.

2-18-76 Before Judd, J. - Case called - defts & attys present - trial resumed - deft Lombardi's motion for mistrial argued - motion denied - trial contd to 2-19-76 at 11:00 am.

2-19-76 Before Judd, J. - Case called - defts and counsel present - trial resumed - trial contd to 2/20/76 at 12:30 P.M.

2-20-76 Before Judd, J. - Case called - defts & counsels present - trial resumed - trial contd to 2-23-76.

2-23-76 Before Judd, J. - Case called - defts and counsel present - trial resumed - trial contd to 2/24/76.

2-24-76 Before Judd, J. - Case called - defts and counsel present - trial resumed - govt rests - defts motion to dismiss argued - all motion denied except as to deft Rakofsky on count 1 - trial contd to 2/25/76 at 10:00 A.M.

2-25-76 Before Judd, J. - Case called - defts & attys present - trial resumed - trial contd. to 2-26-76.

2-26-76 Before Judd, J. - Case called - defts and counsel present - trial resumed - defts rest - trial contd to 2-27-76 at 11:00 A.M.

2-27-76 Before Judd, J. - Case called - defts and counsel present - trial resumed - defts renew all motions to dismiss - motions denied - govt opens on rebuttal - order of sustenance signed - govt rests on rebuttal - defts renew all motions to dismiss - motions denied - jury retires to deliberate - jury returns at 10:10 P.M. and renders a verdict of not guilty as to deft Lombardi - deliberations contd to 3/1/76 at 9:30 A.M.

2-27-76 By Judd, J. - Two (2) orders of sustenance filed.

2-27-76 By Judd, J. - Judgment of acquittal filed (LOMBARDI)

3- 1-76 By Judd, J. - Order of transportation filed.

3- 1-76 Before Judd, J. - Case called - defts and counsel present - trial resumed - jury resumes deliberations - trial contd to 3/2/76

3- 1-76 By Judd, J. - Orders of sustenance (2) and transportation (1) filed.

3- 2-76 9 volumes of stenographers transcripts filed (pags. 1 to 1764a)

3- 2-76 Before Judd, J. - Case called - defts & attys present - trial resumed - Jury deliberations contd at 9:45 am - Order of sustenance signed - Jury returns at 3:00 pm with a verdict as follows: on count 1; not guilty as to deft CAVITOLO on counts 1, 3 - guilty as to counts 4, 5 & 7 as to deft CAVITOLO; counts 6 & 7 guilty as to deft RAKOFSKY, not guilty on counts 3, 1 and 4 as to deft RAKOFSKY. Jury polled - trial concluded - Jury discharged - bail contd. as to both defts. adjd. without date for sentencing as to both defts.

3- 2-76 By Judd, J. - Order of sustenance filed. (Lunch_

3- 2-76 Form of Verdict filed.

3- 5-76 Two stenographers transcripts filed (one dated Mar. 1 and one dated Mar. 2, 1976).

3-18-76 Voucher for expert services filed (interpreter)

5-21-76 Before Judd, J. - Case called - deft & atty. M. Rubenstein present - Imposition of sentence is suspended (RAKOFISKY) and deft is placed on probation for 2 years to run concurrently on counts 6 & 7. Deft is fined \$1,000 on count 6. Deft advised of right to appeal.

5-21-76 Judgment and Order of probation filed - certified copies to Probation (JOEL RAKOFSKY).

5-21-76 Before Judd, J. - Case called - adjd. to 6/3/76 at 9:45 A.M. (DEFILLIPO, CAVITOLO)

6- 1-76 Notice of Appeal filed (RAKOFISKY)

6- 1-76 Docket entries and duplicate of notice of appeal mailed to court of appeals.

6- 3-76 Before Judd, J. - Case called - deft DE FILLIPO & counsel G. Newman present - deft sentenced to imprisonment for 18 months on count 1. On motion of AUSA Greenidge counts 2 to 5 incl., are dismissed. Execution of sentence stayed to June 17, 1976.

6- 3-76 Judgment and commitment filed - certified copies to Marshal (DE FILIPPO).

6- 3-76 Deft. De Filippo's Sentence Memorandum filed (received from Chambers)

6- 7-76 Before Judd, J. - Case called - deft CAVITOLO & atty James La Rossa present - deft sentenced to imprisonment for one year to run concurrent on counts 4, 5 & 8 - deft to serve 60 days and execution of balance of sentence is suspended and deft is placed on probation - sentence to be served at rate of 2 consecutive days per week to be selected by the deft. at Metropolitan Corr. Center. Deft fined the sum of \$5,000 on ct. 4. Deft. advised of right to appeal.

6- 7-76 Judgment & Commitment and order of probation filed - certified copies to Marshal and probation (CAVITOLA) [sic].

6- 8-76 Notice of appeal filed (CAVITOLO)

6- 8-76 Docket entries and duplicate of Notice mailed to the Court of appeals (ANDREW CAVITOLO).

6- 9-76 Judgment & commitment ret'd. and filed - deft
Cavitolo - copies of Judgment del. to MCC, N.Y.

6-16-76 Judgment and Commitment returned and filed/
Anthony DeFilippo delivered to MCC, N.Y.

6-25-76 Order received from the court of appeals that
the record be docketed on or before July 9,
1976.

6-25-76 Stenographers transcript filed dated June 7, 1976.

A TRUE COPY
ATTEST

DATED July 7, 1976

INDICTMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA,

v.

ANDREW CAVITOLO, a/k/a "Andy Zac"
Cavitolo, ANTHONY DE FILIPPO, JOEL
RAKOFISKY and PALMA "PAT" LOMBARDI,

Defendants.

-----X

THE GRAND JURY CHARGES:

COUNT ONE

From in or about April, 1972, up to and including the date of the filing of the instant indictment, both dates being approximate and inclusive, within the Eastern District of New York, the defendant ANDREW CAVITOLO, a/k/a "Andy Zac" Cavitolo, the defendant ANTHONY DE FILIPPO, the defendant JOEL RAKOFISKY, the defendant PALMA "PAT" LOMBARDI, and DANIEL GILBERTI, named herein as a co-conspirator but not a defendant, knowingly conspired to make extortionate extensions of credit, as that term is defined in Section 891 (6) of Title 18, United States Code.

[Tiel 18, United States Code, Section 892(a)]

COUNT TWO

From in or about April, 1972, up to and including the date of the filing of the instant indictment, both dates being approximate and inclusive, within the Eastern District of New York, the defendant ANTHONY DE FILIPPO wilfully advanced sums of money to DANIEL GILBERTI, the said defendant ANTHONY DE FILIPPO having reasonable grounds to believe that it was then DANIEL GILBERTI's intention to use, directly and indirectly, the aforesaid sums, so advanced, for the purpose of making extortionate extensions of credit, that is, DANIEL GILBERTI would make said extensions of credit to individuals directly and indirectly with respect to which DANIEL GILBERTI and said individuals would understand at the time such extensions were made, that delay in making, and failure to make, repayment of the same could result in the use of violence and other criminal means to cause harm to persons, reputation and property of such persons and others.

[Title 18, United States Code, Section 893 and 2]

COUNT THREE

From in or about May, 1973, up to and including August, 1973, both dates being approximate and inclusive, within the Eastern District of New York, the defendant ANDREW CAVITOLLO,

a/k/a "Andy Zac" Cavitolo, wilfully did advance the approximate sum of \$10,000.00 to the defendant ANTHONY DE FILIPPO, the said defendant ANDREW "Andy Zac" CAVITOLO having reasonable grounds to believe that it was then the defendant ANTHONY DE FILIPPO's intention to use, directly and indirectly, the aforesaid sum, so advanced, for the purpose of making extortionate extensions of credit, that is ANTHONY DE FILIPPO would make said extensions of credit to individuals with respect to which ANTHONY DE FILIPPO and said individuals would understand, at the time such extensions were made, that delay in making, and failure to make, repayment of the same could result in the use of violence and other criminal means to cause harm to the persons, reputation, and property of such persons and others.

[Title 18, United States Code, Sections 893 and 2]

COUNT FOUR

From on or about the 29th day of June, 1974 up to and including the date of the filing of the instant Indictment, within the Eastern District of New York, the defendant ANDREW CAVITOLO, a/k/a "Andy Zac" Cavitolo, the defendant ANTHONY DE FILIPPO and the defendant JOEL RAKOFSKY, knowingly combined, conspired, confederated and agreed together and with one another and with diverse persons, to the Grand Jury unknown, to use

extortionate means within the meaning of Section 891(7) of Title 18, United States Code, to attempt to collect and to collect an extension of credit from Joseph Perrone and to punish Joseph Perrone for the non-repayment thereof.

[Title 18, United States Code, Section 894(a)]

COUNT FIVE

On or about July 11, 1974, in the vicinity of the Riviera Caterers, 2780 Stillwell Avenue, Brooklyn, New York, within the Eastern District of New York, the defendant ANDREW CAVITOLLO, a/k/a "Andy Zac" Cavitolo and the defendant ANTHONY DE FILIPPO, knowingly used extortionate means to collect and attempt to collect an extension of credit from Joseph Perrone and to punish Joseph Perrone for the non-repayment thereof, to wit, the use of violence and express and implicit threats to use violence or other criminal means to cause harm to the person, reputation and property of Joseph Perrone.

[Title 18, United States Code, Sections 894 and 2]

COUNT SIX

On or about the 26th day of July, 1974, within the Eastern District of New York, the defendant JOEL RAKOFSKY knowingly used extortionate means to collect and attempt to collect an extension of credit from Joseph Perrone, to wit, the use and

express and implicit threat to use violence and other criminal means to cause harm to the person, reputation and property of Joseph Perrone.

[Title 18, United States Code Section 894(a)]

COUNT SEVEN

On or about the 2nd day of August, 1974, within the Eastern District of New York, the defendant JOEL RAKOFSKY knowingly used extortionate means to collect and attempt to collect an extension of credit from Joseph Perrone, to wit, the use and express and implicit threat to use violence and other criminal means to cause harm to the person, reputation and property of Joseph Perrone.

[Title 18, United States Code, Section 894(a)]

COUNT EIGHT

On or about the 28th day of August, 1974, within the Eastern District of New York, the defendant ANDREW CAVITOLO knowingly used extortionate means to collect and attempt to collect an extension of credit from Joseph Perrone, to wit, the use and express and implicit threat to use violence and other criminal means to cause harm to the person, reputation and property of Joseph Perrone.

[Title 18, United States Code, Section 894(a)]

A TRUE BILL

Wants
pursued
9/27/74
WJ

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK.

-----X

UNITED STATES OF AMERICA

-vs-

ANDREW CAVITOLLO 55
ANTHONY DE FILIPPO 29, QMN
JOEL RAKOFSKY, 32

Defendants

-----X

COMPLAINT

18 U.S.C. §§892, 894 &
371

CHARLES DOMROE, being duly sworn, deposes and says that he is a Special Agent of the Federal Bureau of Investigation, duly appointed according to law and acting as such.

On or during the period July 11, 1974, up to and including the date of this complaint, in the Eastern District of New York, the defendant ANDREW CAVITOLLO, the defendant ANTHONY DE FILIPPO, and the defendant JOEL RAKOFSKY used extortionate methods to collect an extension of credit, in violation of Title 18, United States Code, Section 894, made an extortionate extension of credit in violation of Title 18, United States Code, Section 892, and combined, conspired, confederated and agreed to violate the aforementioned statutes, in violation of Title 18, United States Code, Section 371. The basis of your deponents knowledge consists of the following:

On July 30, 1974, an individual known to your deponent as Joseph Anthony Perrone advised that on July 11, 1974, he was assaulted in the parking lot adjacent to the Riviera Caterers, 2780 Stillwell Avenue, Brooklyn, New York by the defendant ANDREW CAVITOLLO and the defendant ANTHONY DE FILIPPO, in connection with an outstanding obligation claimed to be due and owing CAVITOLLO as a result of an unsuccessful prior business arrangement. The Riviera Caterers is owned and operated by the defendant CAVITOLLO. Perrone was subsequently hospitalized and treated for a facial infection resulting from cuts sustained during the assault.

Thereafter, according to Perrone, he was forced to take employment at a gas station selected by CAVITOLLO, and the defendant JOEL RAKOFSKY was assigned the duty of picking up Perrone's salary at the end of each pay period. The total debt Perrone was told he had to work off was approximately \$8,000.

EXHIBIT "A"

In subsequently monitored and recorded conversations between the defendant RAKOFSKY and Perrone, RAKOFSKY stated that his presence during the aforementioned assault prevented the defendants CAVITOLO and DE FILIPPO from killing Perrone, and that he (Perrone) would be in trouble if he failed to continue his payments. Perrone disputed the validity of the debt with RAKOFSKY, and sought to have RAKOFSKY induce CAVITOLO to accept a lesser amount, but RAKOFSKY told Perrone that it was too early to approach CAVITOLO with such a request, and that Perrone should make at least 12 payments before bringing the matter of an accomodation up with CAVITOLO. During another such conversation, the defendant RAKOFSKY advised Perrone "you're dealing with abnormal people. Ya gotta understand that." Speaking of CAVITOLO, RAKOFSKY also said "the man respects you, too. He thought you'd have to get another beatin. * * * Andy's gained respect for you. Andy told me in the office today 'He took his beatin. He didn't go crying cooper.'"

In a consensually monitored conversation between Perrone and CAVITOLO in August, 1974, the defendant CAVITOLO stated that he realized Perrone was having trouble living without the benefit of his salary, adding "you shouldn't be living at all." Perrone asked CAVITOLO if there would be "any more trouble with you and Flip." The defendant CAVITOLO answered, "you meet your obligation and nothing's going to happen again."

On September 26, 1974, your deponent, together with other Special Agents of the Federal Bureau of Investigation, executed a search warrant issued by United States Magistrate Max Schiffman on September 24, 1974 for the first floor office and second floor den located in the Riviera Caterers. During the search, the defendant CAVITOLO voluntarily supplied your deponent with pay envelopes bearing the name of Perrone and the salary amount. CAVITOLO admitted that he had assaulted Perrone, shortly after threatening him with bodily harm for defaulting on an outstanding debt, and that he had later helped Perrone secure employment at Castelli's garage, Coney Island Avenue, Brooklyn, New York. CavitoLO estimated the debt at \$8,715.00, and

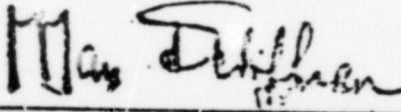
asked your deponent "if someone owed you all that money, wouldn't you do the same thing in my place" (not an exact quote).

WHEREFORE, your deponent prays that a warrant be issued for the above named defendants, and that they be dealt with according to law.

51

Charles Domroe
Special Agent
Federal Bureau of Investigation

Sworn to before me this 27th
E7 day of September, 1974



UNITED STATES MAGISTRATE
EASTERN DISTRICT OF NEW YORK

MOTION TO DISMISS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA,

v.

No. 75 CR 261

ANDREW CAVITOLO, ANTHONY DE
FILIPPO, JOEL RAKOFSKY and PALMER
"PAT" LOMBARDI,

NOTICE OF MOTION

Defendants.

-----X

S I R :

PLEASE TAKE NOTICE that upon the annexed affidavit of JAMES M. LA ROSSA, duly sworn to on the 8th day of May, 1975, the accompanying Memorandum of Law, the Indictment and all the other proceedings heretofore had herein, the undersigned will move this Court before the Hon. Orrin Judd, United States District Judge for the Eastern District of New York, located at the Courthouse, 225 Cadman Plaza East, Borough of Brooklyn, City and State of New York, on the 23rd day of May, 1975 at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an Order pursuant to Rule 4 of the Eastern District Plan for Achieving Prompt Disposition of Criminal Cases, Rule 50(b) of the Federal Rules of

Criminal Procedure, dismissing the said Indictment with prejudice on the ground that the Government has failed to comply with the provisions of the said Rule and Plan; and for such other and further relief as to this Court may seem just and proper.

Dated: New York, New York
May 8th, 1975

Yours, etc.

LA ROSSA, SHARGEL & FISCHETTI
Attorneys for Defendant Cavitolo
Office and Post Office Address
522 Fifth Avenue
New York, New York 10036
687-4100

By _____
JAMES M. LA ROSSA
A Member of the Firm

TO:

HON. DAVID G. TRAGER
United States Attorney
Eastern District of New York
United States Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

GUSTAVE H. NEWMAN
Attorney for Defendant De Filippo
Office and Post Office Address
522 Fifth Avenue
New York, New York 10036
682-4066

AFFIDAVIT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA,

v.

ANDREW CAVITOLO, ANTHONY DE
FILIPPO, JOEL RAKOFSKY and
PALMER "PAT" LOMFARDI,

No. 75 CR 261

Defendants.

-----X

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

JAMES M. LA ROSSA, being duly sworn, deposes and
says:

1. I am an attorney duly admitted to practice in the
United States District Court for the Eastern District of New
York with law offices at 522 Fifth Avenue, New York, New York
10036.

2. I am a Member of the Firm of La Rossa, Shargel
& Fischetti, attorneys for the defendant Andrew Cavitolo and
am fully familiar with the facts and circumstances of this
case.

3. I make this affidavit upon information and belief
except as to those matters wherein it is stated that your deponent

has actual knowledge thereof.

4. This affidavit is made in support of defendant's Motion to dismiss the Indictment herein on the ground that the Government has failed to comply with the Eastern District Plan for Achieving Prompt Disposition of Criminal Cases, Rule 50(b) of the Federal Rules of Criminal Procedure. This Motion is brought by attorneys for and on behalf of both the defendant Cavitolo and defendant De Filippo, who is represented by Gustave H. Newman, Esq., 522 Fifth Avenue, New York, New York 10036.

5. The defendants Cavitolo and De Filippis were arrested along with one Joel Rakofsky on September 27th, 1974. These defendants were arraigned on a complaint which charged violations of Title 18, United States Code, Section 892, 894 and 371. That complaint, which alleges conspiracy and extortionate credit transactions with one Joseph Anthony Perrone, is attached hereto as Exhibit "A".

6. On April 2nd, 1975 an Indictment, docketed as No. 75 CR 261, was filed in the District Court. The Indictment charges the defendants Cavitolo and De Filippo with conspiracy to make extortionate extensions of credit in violation of Title 18, United States Code, Section 892(a) and 894(a) (counts one and four). In addition, defendants Cavitolo and De Filippo are

charged with substantive violations of Section 893 (counts two and three) and Section 894 (counts five and eight). It is clear that the Indictment focuses upon alleged extortionate credit transactions with one Joseph Perrone, who is also identified in the complaint.

7. This Indictment was filed more than six months from the date of the filing of the complaint. The Government, therefore, was not ready to try this case within the prescribed six-month period. Eastern District Plan For Achieving Prompt Disposition of Criminal Cases, Rule 4. In fact, as of the date of this affidavit, the Government has failed to file a Notice of Readiness or otherwise advise the Court that they are ready for trial.

8. The Government has served no indication that they rely upon any excludable period set forth in Rule 5 of the Eastern District Plan. Pursuant to Rule 4, therefore, this Indictment should be dismissed with prejudice.

WHEREFORE, it is respectfully submitted that defendants' Motion to dismiss the Indictment on the ground that the Government has failed to comply with the Eastern District Plan for

Achieving Prompt Disposition of Criminal Cases should, in all respects, be granted or, in the alternative, that a hearing be held to determine whether there are any excludable periods under Rule 5 of that Plan.

/s/ JAMES M. LA ROSSA
JAMES M. LA ROSSA

Sworn to before me this
8th day of May, 1975.

/s/ Marion Panos

Commissioner of Deeds, City of New York
No. 4-1629
Cert. filed in New York County
Commission expires September 1, 1976

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK
3

4 -----x

5 UNITED STATES OF AMERICA :

6 -against- :

7 ANDREW CAVITOLLO, et al. : 75 CR 261

8 Defendants :
9 -----x

10 United States Courthouse
11 Brooklyn, New York

12 June 6, 1975
13 2:00 p.m.

14 B e f o r e

15 HONORABLE ORRIN G. JUDD

16 U. S. D. J.
17
18
19
20
21
22

23 SHELDON SILVERMAN
24 Acting Official Court Reporter
25

Appearances:

DAVID G. TRAGER, Esq.
United States Attorney for the
Eastern District of New York

By: JAMES DOUGHERTY, Esq.
Special Attorney

JAMES LA ROSSA, Esq.
Attorney for Defendant Cavitolo

SIMON CHREIN, Esq.
Attorney for Defendant Lombardi

HAROLD ROSENBLATT, Esq.
Attorney for Defendant Rakofsky

GUSTAVE NEWMAN, Esq.
Attorney for Defendant Defillipo

1 THE CLERK: United States of America
2 versus Andrew Cavitolo, Palma Lombardi, Joel Rakofsky,
3 and Anthony DeFilippo.

4 MR. P. BLATT: Mr. Rothbart couldn't be
5 here this afternoon, so he sent me in his place.

6 THE COURT: And Mr. Chrein?

7 MR. CHREIN: We represent Mrs. Lombardi. She
8 is not a movant in this particular action.

9 THE COURT: Two people were permitted to join
10 with it. Mr. Dougherty, any Government papers on
11 this?

12 MR. DOUGHERTY: Yes, I filed a reply memo-
13 randum. I believe I delivered a copy to your law
14 Clerk. I have an extra copy.

15 THE COURT: Let me look at it.

16 (Said document handed to the Court.)

17 THE COURT: This is a 50B question; isn't
18 that right?

19 Mr. LaRossa, it's primarily your motion,
20 is that right?

21 MR. LA ROSSA: I believe it was brought on by
22 my office, yes, although I don't know if it's
23 primarily mine. I think it applies to a few of the
24 defendants, if not all of them.

25 THE COURT: Mr. LaRossa said the Government

1 had not yet filed a notice of readiness. I don't
2 think there's one yet, is there, Mr. Dougherty?

3 MR. DOUGHERTY: No, your Honor, I think the
4 filing of the notice would be academic until your
5 Honor ruled on the initial motion. The Government's
6 theory is that while conceding that in the absence
7 of a showing of extraordinary circumstances to justify
8 delay, some of the counts would be affected. It is
9 our position that the first three counts of the
10 indictment, as far as the defendants Cavitolo,
11 Defillipo and Lombardi are concerned, are not
12 affected by the delay.

13 As to the defendant Rakofsky, if your Honor
14 rules that the tolling provisions of Rule 5H are
15 not available to the Government, we would at that
16 point be forced to concede that as to the defendant
17 Rakofsky and the other defendants, Counts 4 through
18 8 would be affected by the failure of the Government
19 to observe the six-month period.

20 As to Count 1, the Government's delay in
21 filing the indictment would also affect that count
22 as to the defendant Rakofsky.

23 THE COURT: Counts 4 to 8 as to all
24 defendants.

25 MR. DOUGHERTY: Yes. I believe all the

1 defendants are not named in each count. Some are
2 named either singly or jointly.

3 THE COURT: What are the extraordinary
4 circumstances you recite? We'll look at that.
5 This is really an offer of proof in the memorandum.
6 Are you prepared to prove it now?

7 MR. DOUGHERTY: As to some of those factual
8 matters, I can state of my own personal knowledge
9 the circumstances that I submit to you, your Honor,
10 support the occurrence of those things.

11 As to some of the other allegations, I had
12 a special agent on call to be here at two o'clock.
13 He called to tell me he'd be late, wouldn't be
14 here until 2:30. He's prepared to take the stand
15 to testify as to some of these other matters.

16 In addition, there are some tapes which
17 I at this point am not prepared, that your Honor
18 might consider relevant or irrelevant to a demon-
19 stration of ordinary circumstances, but I intended
20 to offer those tapes for your Honor's hearing in
21 order to aid you to weigh the impact those tapes
22 might have on your determination of the showing of
23 the extraordinary circumstances; however, I turned
24 my duplicate copy of the tapes to defense counsel
25 and had requested that they return them to me, and

1 Mr. LaRossa informed me through inadvertence the
2 tapes are not available. I do have transcripts
3 of some of the tapes that I was intending to offer
4 to play, and if counsel would be willing to stipu-
5 late the accuracy of those transcripts for the
6 purpose of this hearing, I think the transcripts
7 would probably suffice.

8 This is all, of course, based upon my
9 assumption that your Honor would find those tran-
10 scripts would have some value in a determination as
11 to extraordinary circumstances.

12 MR. LA ROSSA: Your Honor, It wasn't through
13 inadvertence, it was through neglect, I forgot.

14 I don't understand what relevancy they
15 have. I want you to understand these tapes are
16 transcriptions of conversations that occurred long
17 before the arrest. What relevance do they have on
18 the extraordinary circumstances that permitted the
19 Government to ignore the six-months rule and not
20 indict? I think we should make that determination
21 at this point, that Mr. Dougherty ought to tell us
22 what occurred sometime prior to the time of the
23 defendants' arrest has any relevancy to the only
24 issue that's before this court, the fact that they
25 didn't indict within six months.

1 THE COURT: Where is the complaint on which
2 they were indicted?

3 MR. LA ROSSA: Attached to the moving papers,
4 your Honor.

5 MR. CHREIN: I read the Government's reply
6 memorandum.

7 THE COURT: Last page of the defendant's
8 motion.

9 MR. CHREIN: I have read the Government's
10 reply memorandum. The Government has taken the
11 position Mrs. Lombardi has no standing to join in this
12 application, but I do believe she does have standing
13 inasmuch as notwithstanding the fact that she was
14 first brought to court on April 10th, the day of the
15 not guilty plea, she and her daughter had received
16 subpoenas to testify presumably concerning this
17 matter. Copies of the subpoenas have been sent to
18 my office by the Government, as part of my discovery,
19 and some of the subpoenas were addressed in September
20 and others were addressed in October, but apparently
21 they might very well relate to the subject matter
22 of this case, so my client--

23 THE COURT: That doesn't start the six-month
24 time.

25 MR. CHREIN: My client was clearly a target

1 or I can assume my client was clearly a target and
2 it was the Government's intention--the Government was
3 aware of what they had concerning my client, and if
4 I assume these tapes concern my client, I have not
5 been given a copy.

6 She was a target at the time the Magistrate's
7 complaint was issued, and I would say that since
8 she was--the Government clearly had developed their
9 theory of prosecution as in regard to my client, the
10 fact they have chosen to arrest some members of the
11 alleged conspiracy and not others, I would say my
12 client might very well have a standing to complain
13 under the 50B rules also.

14 THE COURT: Noble effort, but I deny that.
15 Mrs. Lombardi has no interest in this.

16 MR. LA ROSSA: You understand my issue
17 with respect to the tapes, your Honor? Before your
18 Honor reads any transcript or listens to any tapes--

19 THE COURT: What's the date of the tapes?

20 MR. DOUGHERTY: As to the defendant Cavitolo,
21 the government has in its possession a tape which
22 was the produce of a consensually recorded conver-
23 sation between the co-conspirator, Mr. Daniel
24 Gilberti and Mr. Cavitolo on June 10, 1974.

25 THE COURT: That was before the complaint.

1 MR. LA ROSSA: Yes, three months.

2 MR. DOUGHERTY: I concede the tapes I'm
3 offering are all tapes of conversations that occurred
4 before the date of filing of the complaint.

5 THE COURT: I wouldn't think that had any
6 bearing on why the indictment wasn't brought more
7 quickly after the complaint.

8 MR. DOUGHERTY: Your Honor, those tapes,
9 in the estimation of the Government, reflect a
10 purposeful effort on the part of Mr. Cavitolo and
11 Mr. Defillipo to influence and intimidate witnesses.
12 They contain direct threats against co-conspirator
13 Mr. Gilberti and I think they do have a bearing,
14 at least in their effect on the aggregate picture
15 that is posed by the investigation, that they do have
16 an effect upon the Government's failure to present
17 its entire case to a grand jury for indictment within
18 the period encompassed by the six-month rule.

19 Furthermore--

20 THE COURT: The six-months rule was in effect
21 in September of '74. If you didn't have witnesses,
22 I don't know why you filed the complaint.

23 MR. DOUGHERTY: Your Honor, I was getting
24 to that.

25 THE COURT: All right.

1 MR. DOUGHERTY: The complaint deals with
2 merely one out of a series of transactions. The
3 defendants' position, as I understand it, is that
4 the complaint charges the identical conduct and
5 arises from the same transaction. That is the basis
6 of all of the counts in the indictment, and the Govern-
7 ment takes the position directly contrary to that
8 statement.

9 The complaint that was lodged against the
10 defendants pertains to a single transaction involv-
11 ing a debt that existed between Mr. Joseph Peroni
12 and Mr. Cavitolo arising from a business transaction
13 involving a purchase and operation of a gasoline
14 station.

15 That complaint was lodged after Mr. Peroni
16 came in to our office, after he had received a
17 beating from Mr. Cavitolo and Mr. Defillipo.

18 He was placed in the custody of the United
19 States Marshals within the security program, and
20 the complaint was lodged after Mr. Peroni had worked
21 several weeks at a gas station and was forced to
22 turn over his entire pay salary at the end of each
23 of those weeks and the Government utilized Mr.
24 Peroni's cooperation to accumulate evidence of a
25 conscious plan by these defendants to exploit

1 Mr. Peroni's earning capability in order to have
2 him pay off the debt.

3 That situation continued until it reached the
4 point where Mr. Peroni's safety as well as his own
5 financial condition no longer allowed him to remain
6 in the jurisdiction and continue to work and turn
7 over his salary to the defendants.

8 At that point he was relocated by the marshals
9 and the complaint was lodged and the defendants were
10 arrested.

11 That complaint deals with that singular
12 transaction involving a debt between Mr. Cavitolo,
13 Mr. Defillipo, Mr. Rakofsky, and Mr. Peroni. The
14 indictment charges conspiracy in 1972 between the
15 defendants to engage in the business of making
16 extortionate extensions of credit.

17 While I can see the Government would have
18 intended, had it filed its indictment within the
19 six months period, to submit evidence of the debt
20 between the defendants and Mr. Peroni, its evidence
21 would not have been limited to that particular
22 transaction. In fact, I strenuously urge upon the
23 Court the consideration that while Mr. Peroni's
24 situation arose in June of 1974, that the remoteness
25 in time between that transaction and the beginning

1 of the indictment as the Government's evidence
2 would reflect, removes that transaction from any
3 connection other than a logical one between the
4 events at the outset of the conspiracy and the
5 events culminating in Mr. Peroni's beating and the
6 subsequent arrest of the defendants in September or
7 early October, 1974.

8 To simplify the position of the Government,
9 the inclusion of the Peroni transaction in the
10 initial conspiracy charge contained in Count 1 has
11 a logical connection, and as such I submit and
12 I concede that it arises out of an apparently
13 common scheme or plan by the defendants to make
14 extortionate extensions of credit.

15 Under Rule 8 joinder would be permissible,
16 but I do not think that the defendants' statement
17 that the conduct charged in the indictment is identical
18 with that which was made the subject of the
19 complaint lodged against the defendants in September
20 of 1974, and without that conclusive identity of
21 facts between the count in the indictment, the complaint,
22 I submit the failure of the Government does
23 not render that count defective.

24 THE COURT: Which count are you talking
25 about?

1 MR. DOUGHERTY: Count 1.

2 As to Counts 2 and 3, the dates in the counts
3 themselves predate the beginning of the facts
4 alleged in the complaint.

5 THE COURT: Can you prove Counts 1, 2 and
6 3 without Mr. Peroni's testimony?

7 MR. DOUGHERTY: I believe that the Government
8 can. I would be prepared to submit transcripts
9 of all grand jury testimony submitted in this
10 investigation to the Court for in camera examination
11 so that your Honor can determine whether or not the
12 Government's case can be reduced to the Peroni
13 transaction or whether or not the Government's case
14 consists of a series of transactions not limited
15 to the Peroni transaction, which would then make
16 the complaint not on all fours with the indictment.

17 THE COURT: Suppose Mr. LaRossa, I were
18 to dismiss Counts 4 through 8, would there be
19 anything to prevent the Government's bringing in
20 proof of the Peroni transaction under the Deaton
21 doctrine as other similar facts?

22 MR. LA ROSSA: I want to talk about 1 and
23 2 in relation to the other counts.

24 Let me tell you what happened here. I don't
25 agree with the factual pattern, most specifically,

1 that Mr. Dougherty suggested was the factual
2 pattern presented to the grand jury.

3 When this complaint was filed, the Government
4 had in their possession every tape they now want
5 to show you. As a matter of fact, they had the
6 Gilberti tapes in their possession over a hundred
7 days before the filing of that complaint.

8 2) at the time of filing the complaint
9 Mr. Dougherty told the Magistrate in fixing bail
10 this complaint relates to another extortion, and
11 brings up Gilberti to the Magistrate and fixing
12 \$100,000 bail, and it's right there.

13 He suggested to the Magistrate that this
14 isn't the entire situation. It also involves--and
15 he proceeds to tell him the Daniel Gilberti
16 situation which he refers to in Counts 1 and 2
17 in asking for \$100,000 bail at the time.

18 This is the very day the complaint is filed,
19 and Mr. Cavitolo and the other defendants are
20 brought before the Magistrate.

21 Faced with the situation that we have before
22 us, faced with the Court of Appeals decision in
23 Flores, decided August 7, 1974, about eight months
24 ago, by Judge Kauffman, Hayes and Oakes, they are
25 faced with a situation here where now you, your

1 Honor, must look at this as if it's a statute of
2 limitations.

3 The situation with Peroni not appearing, and
4 the situation in the Flores case, quite frankly,
5 the Government in the Flores case had a much more
6 difficult situation than bringing the witness
7 before the grand jury. In Flores, they had a
8 cooperating witness who just decided he didn't feel
9 like testifying. In Peroni, the Marshals relocated
10 him and paid him and then sometime in December--and
11 accepting the Government's affidavit, even if you
12 accept it as true--

13 THE COURT: What affidavit?

14 MR. LA ROSSA: There's not an affidavit.
15 The memorandum, I'm sorry, your Honor. The witness
16 Peroni suddenly is not available for two months,
17 which brings us to approximately the end of February.

18 Nothing in the affidavit tells you what
19 happened from the end of February until the day of
20 the indictment, which is another six weeks they
21 allow to go by.

22 Nobody comes back to you or the Magistrates
23 or anyone else and says, "We have a problem here.
24 Under the rules we are asking for a 30-day exten-
25 sion." As a matter of fact, this thing was just

1 booted, period. It's as simple as that.

2 To come in here with what, by the way,
3 I call this an affidavit. I shouldn't have, because
4 somebody should have signed an affidavit and swore
5 to the truth of these allegations. To come in here
6 and say a relocated witness, after encountering
7 difficulties in adjusting to his relocation left
8 the supervision of the Marshals and remained in-
9 communicado for a period of several months beginning
10 in late December, if that is sufficient to allow
11 this indictment to stand in the posture it's in
12 right now, then you might as well take Flores and
13 you might as well take the rules of the United
14 States Circuit Court of Appeals and you might as
15 well take the United States v. Kaye, United States
16 v. Pollack, all cited, United States v. McDonough,
17 where our circuit said, forget about how many days
18 it is beyond the six months. Here is what the
19 Circuit Court said in McDonough: "Not six months
20 and three days, not four days, not five days."

21 THE COURT: They sent it back to see if there
22 were special circumstances.

23 MR. LA ROSSA: That's right. Is there any-
24 thing under Rule 5 which will toll the statute of
25 limitations? There is nothing, may it please the

1 Court, in the Government memorandum of law, let
2 alone an affidavit, that in any way tells this
3 under Rule 5, no way. The fact that a witness who
4 has in effect wed himself to the Government by be-
5 coming a relocated witness and have the Government
6 support him, and by the way you ought to hear the
7 other side of the coin. Mr. Cavitolo owns one
8 of the largest catering halls in the City of New
9 York. He bought a gas station across the street
10 from his catering hall because of the mess it was
11 creating, and he put up all the money for Mr. Peroni
12 and another individual to run the gas station and
13 the quarrel here about the money is that Mr. Peroni
14 decided to gamble on horses or shoot crap or some-
15 thing with the money and just took off and left the
16 gas station.

17 Don't get the idea we're involved here with
18 loaning money for interest or vigorish or any such
19 thing as that. We're talking about a responsible
20 businessman who, may it please the Court, if Peroni
21 would walk into this courtroom right now I'd have
22 him locked up for stealing from Mr. Cavitolo.

23 THE COURT: Not in this courtroom.

24 MR. LA ROSSA: The District Attorney.

25 THE COURT: Kings County.

1 MR. LA ROSSA: If I knew where he was,
2 I would have my client file a complaint charging
3 him with grand larceny.

4 How do we get from there to Gilberti? Is
5 the Government permitted to go before the United
6 States Magistrate and suggest to the Magistrate
7 this complaint charging extortionate means not
8 only involves one individual, but involves Mr. Gil-
9 berti as well, while they're not in possession, may
10 it please--

11 THE COURT: The complaint is that he made
12 an extortionate extension of credit and that the
13 credit was to Peroni.

14 He can ask for high bail because there is a
15 murder charge pending against him somewhere else.

16 MR. LA ROSSA: Might I read the section? That,
17 I think, does not cover the situation here. Here
18 is what the charge reads--and I'm referring to the
19 second paragraph of the complaint.

20 "During the period of and up to and including
21 the date of the complaint, the three defendants used
22 extortionate means to collect an extension of credit,
23 make an extortionate extension of credit, and combined
24 conspired, confederated and agreed to violate the afore-
25 mentioned statutes."

1 Then it goes on to say that "The basis of
2 the knowledge consists of the following." Your
3 Honor knows they are not in a posture where they
4 must put down all the bases, all the knowledge, that
5 they have in their possession to effectuate an arrest
6 on the basis of a complaint.

7 THE COURT: If they arrest you and let the
8 six months go by, it doesn't immunize you from crime.

9 MR. LA ROSSA: Of course not.

10 THE COURT: Only the ones for which you were
11 arrested.

12 MR. LA ROSSA: I'm suggesting to you Peroni,
13 Gilberti are in effect one and the same, covered
14 by this section.

15 THE COURT: Was Gilberti the partner in the
16 gas station?

17 MR. LA ROSSA: Yes, sir--no, I'm sorry.
18 Peroni.

19 MR. DOUGHERTY: At the time Mr. Peroni
20 assumed ownership of the gas station Mr. Gilberti's
21 interest had terminated. In fact, Mr. Gilberti had
22 attempted to make a go of the enterprise with
23 Mr. Defillipo and they had not been successful, at
24 which point Mr. Cavitolo assumed ownership of the
25 gas station through his maitre d'. At any rate,
 a straw man, who he appointed owner of the gas sta-

1 tion until Mr. Peroni became a party to a subsequent--

2 MR. LA ROSSA: That's what I challenge.

3 I think they are one and the same. Yes, he was
4 involved in a gas station. Yes, all this informa-
5 tion was before the Government at the time of the
6 making of the arrest. This whole transaction occurs
7 out of the gas station.

8 THE COURT: Let me look at the reasons
9 Mr. Dougherty has here. The first is Joseph Peroni
10 disappeared for a period of months beginning in late
11 December. That I ought to have the facts on.

12 MR. DOUGHERTY: The agent is supposed to be
13 here. He's not here, but someone who perhaps can
14 offer more facts than the agent is the Marshal
15 who handled Mr. Peroni's relocation.

16 THE COURT: Is he here?

17 MR. DOUGHERTY: San Francisco.

18 THE COURT: Who is available to testify?

19 MR. DOUGHERTY: I asked-- His name is
20 Mr. Tatum, John Tatum. I asked him to submit an
21 affidavit. I was intending to offer his affidavit
22 to the Court reciting merely the event pertinent to
23 this motion, because as your Honor may well under-
24 stand, any discussion in detail regarding Mr. Peroni's
25 relocation might raise problems of security.

1 MR. LA ROSSA: How about Peroni, bringing
2 Peroni in?

3 THE COURT: The allegation is he disappeared
4 in late December. Why wasn't he taken before the
5 grand jury between the date of the complaint and
6 the time he disappeared?

7 MR. DOUGHERTY: He was only relocated, your
8 Honor, in October, and relocated--

9 THE COURT: Between October and December you
10 could bring him before the grand jury.

11 MR. DOUGHERTY: He had been relocated tem-
12 porarily. I anticipated bringing him back in view
13 of the fact his relocation was temporary and would
14 cause no serious problems of adjustment or any
15 serious inconveniences. I did not anticipate
16 Mr. Peroni would disappear and deliberately remove
17 himself from the Marshals--

18 THE COURT: Is he relocated?

19 MR. DOUGHERTY: Voluntarily contacted the
20 FBI.

21 MR. LA ROSSA: When?

22 MR. DOUGHERTY: An approximation, about two
23 months ago.

24 THE COURT: That would be April. You said
25 February, Mr. LaRossa?

1 MR. LA ROSSA: It says "for approximately
2 several months."

3 THE COURT: December to April is several,
4 December to February is a couple.

5 MR. LA ROSSA: Is it April?

6 MR. DOUGHERTY: In April just walked in.

7 THE COURT: Let me put the agent on the
8 stand to get some facts.

9 MR. NEWMAN: So the record is complete, I have
10 been noted in my silence, Judge--

11 THE COURT: I assume your case is like
12 Mr. LaRossa's.

13 MR. NEWMAN: Identical. I want to make one
14 or two observations when Mr. Dougherty is present.

15 I want to mention, Judge, if the old fashioned
16 demurrer was being used in the court, they would
17 be applicable--

18 THE COURT: Still here, under--

19 MR. NEWMAN: Really observe in the breach,
20 Judge, more than it's being enforced. It will apply
21 to Mr. Dougherty's reasons as to why the exceptional
22 circumstances--

23 THE COURT: No. 1, if he has an important
24 witness, missing, for a period of time, I suppose
25 that's excluded.

1 MR. NEWMAN: If you would look most speci-
2 fi-ally, you're familiar with Flores, but I think
3 if you look at Flores and Flores, I thought it was
4 a stronger case for the Government in all due
5 deference to my friend Mr. Dougherty was able to
6 allege here at bar limited by the fact, of course,
7 I submit there's key language in Flores which speaks
8 to us and tells us in effect not to allow the
9 speedy trial rules to become a dead letter, and
10 I would suggest most specifically that if these are
11 accepted as reasons, it makes a dead letter.

12 First of all, what's very significant under
13 Allegation 1, for example, that your Honor has
14 paid attention to is the fact this is a witness
15 within their control, and in the vernacular, Judge,
16 they goofed.

17 They're now coming to you and they are saying,
18 "Pull our chestnuts out of the fire." We have a
19 period of time, and as your Honor so correctly
20 observed, if you have a witness who has to be re-
21 located, it seems to me prudence, if not good
22 sense alone, put him into the grand jury, tie down
23 his testimony, and then relocate him, Judge, not
24 allow the luxury of relocation and take a chance
25 that this man of flighty impulse, giving the benefit
of the doubt, may sometime leave the relocation.

1 "We'll come in front of Judge Judd and say this
2 is a flighty witness. We have no way of antici-
3 pating." They have. We have no way of doing it.

4 THE COURT: Extension of time after the
5 indictment instead of before.

6 MR. NEWMAN: Perhaps. That would make the
7 dead letter that Flores warns us against, Judge.

8 I have a second aspect. That was directed
9 to the question of Gilberti. I think that again
10 goes into the dead letter. I was not present at
11 the arraignment. I didn't represent Mr. DeFillipo
12 at the arraignment. Mr. Albert C. Aronne was
13 present. Mr. Aronne advises me, Judge, at the time
14 of fixing of bail exactly as Mr. LaRossa indicated,
15 the Gilberti matter was brought to the attention
16 of the Magistrate.

17 I recognize it's not included in the
18 complaint, but as Mr. LaRossa properly pointed out,
19 the complaint speaks in terms of conspiracy or
20 conspiracies.

21 I say to Mr. Dougherty he can't have it both
22 ways. If he's contending a common scheme or plan
23 provable under the conspiracy theory let alone any
24 judicial theory, and I can successfully defend
25 against a motion to sever, then I say he's stuck

1 with it. He put it into one indictment. He is
2 chargeable with what he does, not what he elects
3 to set forth in a complaint.

4 I think at this point what becomes interest-
5 ing is the statement Mr. Chrein made, Judge, which,
6 isolated, seems to have no relevancy. His client,
7 Mr. Chrein's client, was subpoenaed before a grand
8 jury in connection with the Gilberti matter involv-
9 ing the self-same defendants long prior to the
10 issuance of this complaint, which makes the Govern-
11 ment chargeable with the knowledge, and all the
12 Government did was give us a bare bones complaint
13 to have a magistrate set bail, but that doesn't
14 get him off the hook. In the language of Flores
15 make a dead letter of the speedy trial rule.

16 What they are saying to you, Judge, we knew
17 about ABC and D. ABC are properly includable under
18 the indictment under conspiracy counts. However,
19 we have only chosen, in order to comply with our
20 bail, to set forth A; therefore, since we were
21 late with A, because of our neglect, B and C get a
22 second life because we didn't put it in the complaint.

23 Judge, most humbly, that makes a dead letter
24 out of the speedy trial rules.

25 THE COURT: You're answering the question

1 put to Mr. LaRossa. You're not necessarily answer-
2 ing this. It might be improper if I strike out
3 the later counts of the indictment to let the
4 Government bring the Peroni case before the jury.

5 MR. NEWMAN: It goes to the heart of the
6 whole matter of what is the meaning of the speedy
7 trial rule, why were they enacted? Could the
8 Government frustrate the technical aspect of it
9 not including the names but saying everything else
10 related to the names, putting those same names in
11 an indictment and because they had the foresight,
12 weren't required to allege them even though they
13 knew about the acts, didn't allege in the complaint,
14 they're off the hook, so to speak?

15 I say, Judge, that makes a dead letter out
16 of the speedy trial rules. That's what Flores is
17 all about.

18 THE COURT: That's rhetoric.

19 MR. DOUGHERTY: Should I put him on the
20 stand?

21
22 C H A R L E S D O M R O E, Special Agent, Federal
23 Bureau of Investigation, called as a witness,
24 having been duly sworn by the Clerk of the Court,
25 DIRECT EXAMINATION

Domroe-direct

BY MR. DOUGHERTY:

Q Do you know an individual by the name of Joseph Peroni?

A Yes, I do.

Q Did you come to know Mr. Peroni in an investigation into a possible violation of the extortionate credit violation statute?

A Yes.

Q Did there come a time when you became aware of your own personal knowledge Mr. Peroni had become a relocated witness?

A Yes.

Q Do you recall approximately when it was that Mr. Peroni assumed such status?

A I believe it was in November of '74.

Q Do you recollect in December of '74 when you had occasion to hear either from Mr. Peroni or anyone connected with the United States Marshal's service?

A I'm sorry, I didn't hear the question.

Q Directing your attention to the month of December, 1974, do you know whether or not Mr. Peroni was still continuing in the relocation program?

A Yes.

Q Do you recollect when that status changed?

Dumroe-direct

1
2 A Yes.

3 Q Approximately when did that occur?

4 A I believe it was in early January, '75.

5 Q How did you come to learn that his status
6 as a relocated witness had in fact changed?

7 A I learned that through the U.S. Marshal.

8 Q Did the Marshals tell you that they were in
9 contact with Mr. Peroni at that time?

10 A Prior to his leaving?

11 Q No, after his leaving.

12 A They were not in contact.

13 Q Did you of your own personal knowledge--were
14 any other agents connected with this investigation know
15 where Mr. Peroni was after he left the relocation program
16 in early January?

17 A No.

18 THE COURT: What was his change of status?

19 You say status change.

20 THE WITNESS: Detached from the U.S. Marshal's
21 service with his protection program.

22 Q Did you make any attempt to locate Mr. Peroni?

23 A Yes, I did.

24 Q What exactly did you do?

25 A Later on in March I spoke with his mother-in-

Dumroe-direct

1
2 law in Brooklyn. I asked her where Peroni and his wife
3 and children were. She said she wasn't sure that she
4 would try to contact them and have them in turn contact
5 me and Peroni did so.

6 Q When was that?

7 A That was in April.

8 Q Between January and April did you have any
9 contact with Mr. Peroni or his wife?

10 A No, I did not.

11 THE COURT: Do you have any more precise
12 dates on this?

13 THE WITNESS: Your Honor, I do, but I'm not
14 prepared. I haven't reviewed the file.

15 Q Do you recall whether or not it was early
16 in April or toward the latter part of the month?

17 A I believe it was mid-April.

18 Q Isn't it a fact that you had a conversation
19 with me sometime in late December or early January regard-
20 ing Mr. Peroni's disappearance?

21 A Yes.

22 Q Do you recall telling me on that occasion
23 that Mr. Peroni had voluntarily left the area of relocation
24 that the Marshals had--

25 MR. LA ROSSA: I object to this.

Dumroe-direct

THE COURT: Sustained. You're really getting a double hearsay.

MR. DOUGHERTY: I have no further questions.

THE COURT: Mr. LaRossa.

CROSS EXAMINATION

BY MR. LA ROSSA:

Q Mr. Dumroe, are you the case agent in this case?

A Yes, I am.

Q I assume that you have a file with the FBI relating to this case.

A I do.

Q You told us that in November, 1974, Mr. Peroni was placed in the custody of the United States Marshal.

A Yes.

Q Can you tell us when in November?

A I can't without reviewing the file.

Q If we had your file, would there be a 302 that would give us the date in November that he was placed into relocation position?

A There would not be a 302.

Q There would not?

A That's right.

Q Would there be something in your file to give

Dumroe-cross/LaRossa

the date?

Yes.

Q Would that be a conversation with a United States Marshal?

A It would just-- Yes, it would be.

Q During that conversation did you come to know where Mr. Peroni had been relocated--I'm not asking where, I'm saying did you know the place that he was relocated.

A Relocated to?

Q Yes.

A Not initially, no.

Q You didn't know it in November?

A No, I did not know it in November.

Q Do you know whether or not he had used a different name in November with respect to this relocation?

A I know that he did use a name.

Q Did you know the name in November?

A No, I did not.

Q Do you know whether the United States Marshal who conducted this type of service knew the name in November?

A I'm sure they did. They gave the name.

Q Do you know whether they knew the address he was living at?

A At the time of his relocation?

Dumroe-cross/LaRossa

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Q Yes.

A I can only say I would assume that they did,
relocating him.

Q Did you know if they knew any place of employ-
ment that he was using?

A I don't know.

Q Did you tell us that sometime in December,
1974, you found out that he was no longer in that relocation
position?

A I believe it was December.

Q How did you find out?

A I found out through the U.S. Marshal.

Q How? By a phone call?

A Yes.

Q What did they tell you?

A Simply that he had been detached from the
U.S. Marshal's service program, that they were unable to find
out where he was, and his detachment was voluntary on his
part.

Q Tell me what that meant to you. I assume
you're not quoting, you're not giving us verbatim.

THE COURT: Sounds like legal argot to me.
It sounds like he ran away. The Marshals couldn't
find him, so they treated him as voluntarily

Dumroe-cross/LaRossa

detached.

THE WITNESS: As we learned later, your Honor, they talked with him prior to his leaving and he voluntarily signed a form. I believe they maintained that form and he voluntarily left the program.

Q So are you telling us now then that a government official prior to the time he left the relocation position knew that he was going to leave that position?

A I don't know if he knew.

Q Did you tell us that he signed a form which indicated that he was leaving the relocation position?

A I have no first-hand knowledge as to whether he signed a form. I'm telling you what they told me.

Q Mr. Dumroe, you have no first-hand knowledge, but you told us what other people told you, didn't you?

A I have first-hand knowledge about a lot of things.

Q Do you?

A Yes.

Q Who told you that he signed the form?

A Marshal Butler.

Q He's the United States Marshal in this district, is he not?

Dumroe-cross/LaRossa

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- 2 A That's correct.
- 3 Q Did he tell you when that form was signed?
- 4 A He didn't give me any specific date.
- 5 Q It certainly had to be before he relocated
- 6 him; isn't that right?
- 7 A I would think so.
- 8 Q Did you see the form?
- 9 A No.
- 10 Q Do you know what the form contained?
- 11 A No.
- 12 Q Do you have any idea what kind of form it is?
- 13 A Just as they explained it to me.
- 14 Q What did they explain to you?
- 15 A That it's a form they sign and releasing
- 16 him from the U.S. Marshal program.
- 17 Q Can you tell me when that form was signed?
- 18 A I don't know the exact date.
- 19 Q You're sure it was in December?
- 20 A No. I said I believe it was in December.
- 21 Am I sure? No, I'm not, without reviewing the file.
- 22 Q At that point did you know what city he was
- 23 living in?
- 24 A Yes, I did.
- 25 Q In December or whenever it was that you got

Dumroe-cross/LaRossa

the phone call from Mr. Butler?

A Yes.

Q Did you know what name he was using?

A No.

Q Would Mr. Butler have shown you the form if you wanted to see it?

A I don't know.

Q Did you ask him to see it?

A No.

Q Did you ask him what name he was using?

A No.

Q When you found out what city it was did you call your resident agent in that city and tell him to please inquire to see whether he was still living at that address?

A No.

Q Did you call a resident agent of that particular city and ask him to check the telephone pages of that particular city to find out if Mr. Peroni was living in that city?

A Not at that time.

Q Did you do it in January, 1975?

A No.

Q Did you do any of these things in February, 1975?

Dunroe-cross/LaRossa

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A The end of February.

Q At that point in the end of February you found out the name Mr. Peroni was using?

A I didn't find out the name until April.

Q What did you do in February? Did you contact a resident agent in the city in which Mr. Peroni was living?

A No, I inquired of the U.S. Marshals. I asked them to do it, since he was under their protection.

Q Do you know whether they did? Did they submit a report to you?

A U.S. Marshals do not submit reports to the FBI.

Q Did you get a report of any kind?

A They don't submit reports to the FBI.

Q Did you get a writing of any kind from the Marshals?

A No.

Q Do you know whether the United States Attorney got a report in writing?

A I don't know.

Q What did they tell you in February, 1975? If anything.

A They told me that he was no longer on the program.

Dumroe-cross/LaRossa

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Q You knew that in December, didn't you?

A I had no further information besides that.

Q You mean from December to February, the only thing you found out was exactly what you knew in December, that he signed a form no longer being in that program?

A I expected Peroni to call me. He was-- He had in the past relied on me in a great deal of matters, because of that I expected him to call me. The U.S. Marshal told me he was detached from the program. He didn't at that time specify the reasons why he was detached. He said it was voluntary.

Q Mr. Dumroe, when you spoke to the Marshals in February, 1975, what did you ask them to do?

A I asked to check the city of relocation to see where he was, to see if anything, any leads, could be developed from the location from where he was at the time.

Q Who did you ask, Mr. Butler?

A Or his assistant. I think his name is Fitzgerald.

Q Did you have a conversation subsequent to that with either Mr. Butler or Mr. Fitzgerald?

A Yes.

Q Did you ask him at that time what name he was using?

Dumroe-cross/LaRossa

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A Yes.

Q Did he tell you?

A He did.

Q At that point we're in February, 1975; is that correct?

A Or thereabouts.

Q Did you at that point contact the FBI or any local agency in the city of relocation and ask them to make contact?

A No.

Q When did you hear from the Marshal's service again after February, 1975?

A I can't recall any specific dates.

Q Was it during the same months?

A I don't know.

Q Did a long time pass?

A (No response)

Q Did weeks, months--

A Until March.

Q Did you call the Marshal's service again?

A I did.

Q What did you find out?

A I wanted to get more specific information as to where he might have gone.

Dumroe-cross/LaRossa

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2 Q Where he might have gone from the relocated
3 position?

4 A Yes.

5 Q What were you told?

6 A I was told they did not know.

7 Q Did you ask him what they did?

8 A Yes.

9 Q Did they tell you?

10 A They told me they had made inquiries, the
11 U.S. Marshal's office, at his place of relocation. They
12 were unable to find out where he was.

13 Q Did they tell you what they asked the local
14 marshal's office to do to attempt to find Mr. Peroni?

15 A No.

16 Q Do you know whether they did anything?

17 A They said they did.

18 Q What?

19 A They said they tried to get leads for me to
20 find Peroni.

21 Q Did they tell you what they did to get leads?

22 A Specifically, no.

23 Q You didn't ask them?

24 A That's right.

25 Q When in March was this, the beginning of March,

Dumroe-cross/LaRossa

the end of March?

A Without reviewing the file I cannot give you any exact date.

Q Or even which part of the month?

A That's right.

Q When was the next time, if ever, that you did anything to locate Mr. Peroni?

A Latter part of March, early April.

Q What did you do?

A Again I went to the U.S. Marshal's service, asked them to get me the full information about his present location, about what leads they might develop for us. They referred me to an office in another state, and through the FBI resident agencies in that state I received information, specific information, on Peroni.

Q On Peroni?

A Background information.

Q Did you find out where he lived?

A No.

Q You mean this is how you got to the mother-in-law?

A That's right.

Q You mean up until that point you didn't know anything about the mother-in-law?

Dumroe-cross/LaRossa

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2 A That's exactly right.
3 Q Did you know the wife?
4 A I did.
5 Q Did you know the wife's name?
6 A (No response)
7 Q Maiden name?
8 A I did. I don't recall it now.
9 Q I'm sorry?
10 A I don't recall it now. I did.
11 Q Do you know whether the Marshal's service
12 required a form to be filled out?
13 A In--
14 Q In which they gave next of kin?
15 A Yes.
16 Q Did you ask the Marshal whether--about the next
17 of kin way back in December when you found out he wasn't at
18 the relocated position? Can you answer that?
19 A Why?
20 Q Did you?
21 THE COURT: He's answering it.
22 A On the relocation, to the area in which he
23 is going to be relocated, they forward all the papers.
24 They had nothing in New York, they said.
25 Q You knew the relocation area, didn't you?

Dumroe-cross/LaRossa

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A (No response)

Q Did you find out the next of kin from that relocation area?

A Yes. That's how I got to his mother-in-law.

Q That's what you did in March?

A That's right.

Q But you could have done that in December, couldn't you?

A Expecting-- I could have.

Q No question about it. You could have done it in January, roo?

A Right.

Q February?

A That's right.

Q The only thing you did was speak to the mother-in-law sometime right after that you got a phone call from Mr. Peroni; is that correct?

A Right.

Q Then Mr. Peroni agreed to come to this district to appear before the grand jury?

A That's right.

Q Tell me how long before Mr. Peroni decided to relocate did he sign that form for Marshal Butler?

A I don't know.

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Q Did you know about it before he relocated?

A What form are you talking about?

Q Do you know whether he signed this form agreeing to relocate; did you know about it when he signed it?

A (No response)

Q Do you know what I'm talking about?

A I know exactly what you're talking about.
I did not see any form. I know-- I don't know even if he has to sign a form to be relocated.

Q You told us he signed a form agreeing not-- agreeing to be unrelocated or whatever the word--

A Detached. Yes, I did. They told me.

Q When did you find out about it?

A It was December.

Q Was it before he left that area?

A They said yes.

Q Did you pick up the phone and call him?

A Who?

Q Peroni.

A I didn't know where he was. We're not privy to that information.

Q Did you ask the Marshal for the phone number so you could speak to him?

A No, he was gone, not the Marshal, but Peroni.

Dumroe-cross/LaRossa

THE COURT: Anything more?

Q Did you make up any 302s on any of the things you told us here today?

A No.

Q Not a one?

A Not evidentiary.

Q Are there any notations in your file as to any of the things you have told us?

A Yes.

Q Where is the file?

A At my office.

MR. LA ROSSA: I would like to see the notations in the file.

MR. DOUGHERTY: I would object, your Honor. If necessary, I can produce the Marshal on an adjourned date. He can talk to the Marshal about this relocation or submit an affidavit pertaining to the dates that are in issue here, the dates he was relocated, voluntarily left the service, and when he signed the forms.

THE COURT: It seems to me he must have come back before mid-April if the indictment was dated April 2nd, and if he testified before the grand jury after he was relocated. Maybe I ought to look at

Dumroe-cross/LaRossa

the grand jury minutes, as you suggested.

MR. DOUGHERTY: Perhaps it's my fault, but the Court and counsel seem to be laboring under a misapprehension. He appeared once in the grand jury. I intended to have him appear on a second occasion. He appeared before his relocation in September, and I needed Mr. Peroni for a subsequent appearance. I ought to correct that misapprehension.

MR. LA ROSSA: I'm afraid we had no knowledge of that. I think that makes the argument a little more interesting. I now ask your Honor to take the grand jury minutes of Mr. Peroni and make the determination based upon those minutes--

THE COURT: I'll look at all the grand jury minutes to see whether the Peroni matter can be separated from the rest of the complaint, too, unless there is some reason counsel think I shouldn't.

Normally I would like to avoid it, but I think I have to do it in connection with the motion.

MR. LA ROSSA: I have no objection to your looking at it. If your Honor reads it and makes a determination favorable to the movants, that's one thing; however, if your Honor feels that the grand jury minutes raise issues, I would like to have the

1 opportunity to be able to see the agents' notes with
2 respect to these dates and to be in a position to
3 call the marshal who the agent spoke to during this
4 period.

5 THE COURT: I don't know about that, but
6 I would think--

7 MR. LA ROSSA: I'm talking about Mr. Ben
8 Butler. Apparently all these conversations were
9 with Mr. Butler or his assistant.

10 MR. DOUGHERTY: No problem with that.

11 THE COURT: I would like an affidavit from
12 the witness to supplement the hearing with respect
13 to the dates that appear in his notations.

14 MR. DOUGHERTY: I can also do-- Your Honor,
15 we would probably obviate the need to call Mr. Butler
16 because I'm sure Mr. Butler got all of his informa-
17 tion second-hand, was to submit an affidavit from
18 Marshal Tatum, who was in the actual charge of the
19 relocation effort of Mr. Peroni and was the super-
20 visory marshal, and all he need do is check his file
21 and can give the Court, counsel, all of the facts
22 that are relevant that have been raised by the
23 hearing here.

24 THE COURT: Give a copy of the affidavit to
25 the defense counsel, and I'll consider after that.

1 if I hear from them whether some further testimony
2 would be necessary. I'm supposed to have a two-
3 three o'clock matter this afternoon. I have not
4 quite anticipated taking testimony or having quite
5 as long an argument on this, but it raises some
6 interesting possibilities.

7 I have started on No. 1, that seemed to relate
8 to the period of delay.

9 Your No. 2 in your memorandum, Mr. Dougherty,
10 witnesses were advised during the conduct of the
11 grand jury investigation, what has that--what period
12 does that refer to?

13 MR. DOUGHERTY: This predates the date of the
14 filing of the complaint.

15 THE COURT: I don't think that has any bearing.

16 MR. DOUGHERTY: I can save the Court time.
17 All of the remaining points contained in that part
18 of the reply brief pertain to events which occurred
19 before the date of filing.

20 THE COURT: My present indication is that I
21 would not consider those relevant to Rule 50-B.
22 I don't have to spend more time on that.

23 MR. NEWMAN: Might I ask this witness some
24 questions.
25

Dumroe-cross/Newman

CROSS EXAMINATION

BY MR. NEWMAN:

Q Agent Dumroe, when for the first time did you meet Joseph Peroni?

A I would have to refer--

MR. NEWMAN: Might I approach the witness, please, your Honor.

THE COURT: Yes.

Q Take a look at the complaint, the affidavit that you signed, and tell me if it refreshes your recollection (handing to the witness).

A July of '74.

Q He related a set of facts to you?

A Yes.

Q Concerning individuals Cavitolo and Defillipo?

A Yes.

Q Any other people?

A One other.

Q Who is that, sir?

A Joel Rakofsky.

Q As a result of that did you equip him with any kind of recording equipment?

A Yes.

Q As a result of that did he then record

Dumroe-cross/Newman

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2 conversat s between himself and these co-defendants or
3 these defendants?

4 A Yes.

5 Q You're in possession of these tapes?

6 A I am.

7 Q When, when were these recordings made, to your
8 knowledge?

9 A I would have to refer to the indictment.

10 Q Would it refresh your recollection if you
11 were to look at the complaint, sir?

12 A Yes.

13 Q (Document handed to the witness by Mr. Noonan)

14 A July and August of '74.

15 Q You had those tapes in your possession?

16 A Yes.

17 Q Were those tapes ever presented to a grand
18 jury, do you know?

19 A Some were and some were not.

20 Q Do you know--

21 A I don't know which ones.

22 Q Do you know when for the first time they were
23 presented to a grand jury?

24 A Shortly after Peroni testified, September or
25 October.

Dumroe-cross/Newman

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2 Q But there's no doubt in your mind, sir, you
3 had them in your possession from August, the latest, 1974?

4 A They were in my possession from the date they
5 were made to the present.

6 Q The latest was August of '74?

7 A Yes.

8 Q Now, sir, did you ever testify before a grand
9 jury?

10 A With regard to this matter?

11 Q Yes, sir.

12 A Concerning Peroni, no.

13 Q Concerning Gilberti?

14 A I don't recall. I don't think so.

15 Q Would you have any notes or memoranda in
16 your possession to refresh your recollection of Gilberti?

17 A Grand jury minutes would refresh my recollec-
18 tion.

19 MR. NEWMAN: Rather than belabor that, I assume
20 you will include that?

21 THE COURT: That's right.

22 MR. NEWMAN: Thank you, your Honor.

23 Q May I ask you this: At the time that you were
24 conducting this investigation, based upon the complaint
25 that Peroni gave you, were you aware of the existence of

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A Yes.

Q Were you aware of his relationship to the defendant Defillipo and Cavitolo?

A Yes.

Q Were you aware of the fact that he was also a complainant, so to speak, against them for the same type of activities?

A He was not a complainant against them.

Q Were you aware, though, that he had had transactions with Defillipo and Cavitolo?

A Yes, I was.

Q Of the same nature that Peroni had?

MR. DOUGHERTY: I'm going to object to that question.

THE COURT: It's a broad question.

MR. NEWMAN: Withdrawn.

Q Did you know of any business relationship between Gilberti and Cavitolo in connection with the gasoline station?

A Yes.

Q Did you learn that Peroni was in fact the successor in interest to Gilberti's interest in that gasoline station?

MR. DOUGHERTY: Objection.

Dumroe-cross/Newman

THE COURT: Overruled.

A I believe there was one owner between their proprietorship of the gas station.

Q You're aware of the fact one time Gilberti was an owner, subsequent owner, and then Peroni was an owner?

A Yes.

Q All in relation to Cavitolo?

A Yes.

Q Were you aware of this on the date Cavitolo and Defillipo were arrested?

A Yes.

Q As you sit here now, do you know, sir, whether an independent grand jury investigation or presentation was made concerning either of these defendants (indicating), Cavitolo or Defillipo in relation to Gilberti?

MR. DOUGHERTY: Objection. I don't understand the question.

Q Do you have any trouble with the question?

A I don't understand the question.

MR. NEWMAN: Withdrawn.

Q Do you know if there was an investigation, grand jury, involving these two defendants, Defillipo and Cavitolo, prior to Peroni coming to talk to you?

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A Other than the federal?

Q Federal.

A I don't know of any.

Q Do you know if there was a grand jury investigation prior to your arrest of Cavitolo and Defillipo, involving Gilberti?

A I don't know.

Q Do you know if a woman by the name of Pat Lombardi was called before a grand jury in connection with Gilberti prior to your arrest, with Cavitolo or Defillipo?

A I don't know whether it was prior. That's true.

Q Was she called in connection with Gilberti's transactions with Cavitolo and Defillipo?

A Yes.

Q And do you know when this was, sir, when this grand jury proceeding was done?

A No, I don't.

Q Do you have any records or documents in your possession, sir, which would refresh your recollection?

A Not at hand.

MR. NEWMAN: Do you, Mr. Dougherty?

THE COURT: Would that be among the grand jury minutes I'm going to get?

Dumroe-cross/Newman

THE WITNESS: Yes, they would.

MR. DOUGHERTY: Mrs. Lombardi was never put before the grand jury. She was subpoenaed but never testified.

MR. LA ROSSA: We'll stipulate.

MR. NEWMAN: If you give us the date.

MR. DOUGHERTY: The date subpoenaed?

MR. NEWMAN: Yes.

Might I show this to the witness (indicating)?

THE COURT: Yes.

Q Would this refresh your recollection, sir?

A Yes.

Q Is this your handwriting, as a matter of fact?

A Yes.

Q That indicates that October 26, '73, the subpoena was issued and it was made returnable, is that correct, for when?

A It was issued November 15th.

Q Made returnable for November 26th?

A That's correct.

Q As you sit here now, sir, was that subpoena issued in connection with Gilberti's dealings with Cavitolo and Defillipo?

A Yes, part of it.

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THE COURT: '73.

MR. NEWMAN: Yes, sir.

Q Now, sir, I direct your attention to two other subpoenas. Are you familiar with the name Dianne Lombardi?

A Yes.

Q What if any was her relationship to Pat Lombardi?

A The daughter of Pat Lombardi.

Q Do you recollect--

MR. NEWMAN: Withdrawn.

Q Did you ever learn Dianne Lombardi was the girlfriend of Gilberti?

A Yes.

Q As a matter of fact, they lived together? Did you ascertain that?

A I don't know whether they actually lived together.

Q In any event, you learned there was girlfriend-boyfriend?

A Yes.

Q Do you recollect, sir, when a subpoena was served on Dianne Lombardi to testify before the grand jury?

A Yes.

Q When was that returnable, sir?

Dumroe-cross/Newman

1 A Returnable September 13th.

2 Q Of 1973, sir?

3 A '73.

4 Q That was in connection with Gilberti's tran-
5 sactions and dealings with Cavitolo and Defillipo?

6 A Yes.

7 Q And did Pat Lombardi in fact appear before
8 the grand jury and testify?

9 A I don't know. I subpoenaed her. I was under
10 the belief that she was--

11 MR. DOUGHERTY: She did not appear. Dianne
12 Lombardi appeared. Pat Lombardi did not appear.

13 MR. NEWMAN: Do I understand we have a stipu-
14 lation Dianne Lombardi did appear and testify?

15 MR. DOUGHERTY: Yes.

16 MR. NEWMAN: Do we have those grand jury
17 minutes available?

18 MR. DOUGHERTY: Yes.

19 MR. NEWMAN: I'm sorry to usurp your function.
20 I wanted to know for my own education.

21 THE COURT: That's all right.

22 Q Now, sir, on the date Mr. Cavitolo and Mr.
23 Defillipo were arrested, sir, did you also have the Gilberti
24 tapes, that is, the tapes of conversations between Gilberti
25

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and Cavitolo and Defillipo?

A Yes.

Q You, of course, told this to Mr. Dougherty,
no doubt?

A Yes.

Q Do you know if those tapes that you had in your
possession in connection with the Gilberti conversations were
conversations with Cavitolo and Defillipo were played before
a grand jury?

A I don't know actually whether they were played
before a grand jury.

MR. NEWMAN: I assume if they had, that would
be in the minutes you're delivering to Judge Judd.

MR. DOUGHERTY: Yes.

MR. LA ROSSA: Could we have a record stipu-
lation on whether they were, if they were, what
date?

THE COURT: Sometime, not right now.

MR. DOUGHERTY: At least eight tapes.
I would have to check all the grand jury minutes.

THE COURT: Let's not take that now.

MR. NEWMAN: One other area.

THE COURT: Yes.

Q Going into this program of relocation, who

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delivered Mr. Peroni, so to speak, to the marshals for the purpose of relocation?

A The marshals themselves.

Q Who made the decision that he was to be re-located?

A The United States Attorney.

Q In consultation with you, sir?

A Yes, the United States Attorney's decision.

Q Do you know the specific Assistant United States Attorney who made that decision?

A It was Bob DelGrosso.

Q Do you know when this decision was made by Mr. DelGrosso?

A It must have been in November of '74.

Q November of '74?

A Right.

Q Prior to that time, to your knowledge, was Mr. Peroni before the grand jury?

A He was.

Q Prior to that time was Mr. Gilberti before the grand jury, to your knowledge?

A Yes, he was.

Q Testifying in connection with Cavitolo and Defillipo?

Dumroe-cross/Newman

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2 A Yes.

3 Q Now, as part of this procedure of relocation,
4 if you know, is the name of the Assistant or the case agent
5 who is handling the case provided to the marshals for the
6 purpose of a contact in connection with the relocated
7 witness?

8 A No.

9 Q It's not?

10 A Not that I know of.

11 Q Do I understand you correctly, sir, that you
12 don't know?

13 A The marshals do not have my name in connection
14 with the case, as far as I know, to my knowledge.

15 Q To your knowledge, sir, did they have the
16 name of Mr. DelGrosso?

17 A I believe they did.

18 Q At the time of the relocation?

19 A I believe they did.

20 Q To your knowledge, sir, between the time of
21 the relocation and the time that Mr. Peroni, as you say,
22 discharged himself from this, do you know if any communica-
23 tion was passed from the marshals to Mr. DelGrosso concern-
24 ing this voluntary departure?

25 A I don't know.

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Q Now, sir, when Mr. Peroni came to you for the first time in July of 1974, did you take a pedigree or background or family information from him?

A Yes.

Q Did you take names of next of kin?

A Of his next of kin.

Q Did you take the name of his wife?

A Yes.

Q Did you take the name of his mother-in-law?

A No.

Q Did you take the name of his father?

A Who his father, Peroni's?

Q Peroni's.

A I believe I did.

Q Did you take the name of any other sisters or brothers?

A I believe I did.

Q Did I understand your testimony correctly, between December of 1974 and March of 1975 your first contact with the family was with the mother-in-law; is that right?

A That's right.

MR. NEWMAN: No further questions of this witness.

THE COURT: If you have the grand jury

1 minutes now, you can give them to me and I'll
2 decide the matter as fast as I can.

3 MR. DOUGHERTY: I have written out a schedule
4 of what minutes are actually being turned over
5 (handing to the Court).

6 THE COURT: Let me check to be sure what
7 I have here.

8 MR. NEWMAN: Judge--

9 THE COURT: Just a minute.

10 If you want to submit anything further
11 with request the Government reply, I'll take it.

12 MR. NEWMAN: Might I ask one question in
13 the luxury of afterthought.

14 BY MR. NEWMAN:

15 Q Do you know if after Mr. Gilberti's appearance
16 before the grand jury he ever made a second appearance before
17 the grand jury?

18 A I don't know.

19 MR. NEWMAN: Thank you.

20 THE COURT: Mr. Rosenblatt, I guess you
21 don't want to add anything.

22 MR. ROSENBLATT: The only thing I want to add,
23 I believe my office at some time in the past, since
24 we had not made any written motion papers, that we
25 had an agreement with the Court that Mr. LaRossa's

1 motion would be deemed our motion.

2 THE COURT: It applies to Defendant Defillipo
3 and Rakofsky as well as Cavitolo.

4 MR. LA ROSSA: Adjourned without date,
5 Judge?

6 THE COURT: Decision reserved.

7 MR. NEWMAN: Judge, with your permission, we
8 have ordered the minutes to make any kind of
9 effective additional memoranda, I would like to
10 consult with the minutes, consult them.

11 THE COURT: Very well. It's my position at
12 the time I'm disposing of the motions outside the
13 six-months rules anyway, but I'm not going to pro-
14 long it beyond what human limitations require.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA,

v

75 Cr. 261

ANDREW CAVITOLLO, ET AL.

Defendants
-----X

GOVERNMENT'S REPLY TO DEFENDANTS'
JOINT MOTION TO DISMISS THE
INDICTMENT

On May 8, 1975, the defendants filed a joint motion to dismiss the indictment herein for failure to comply with Rule 4 of the Eastern District Plan for Achieving Prompt Disposition of Criminal Cases, Rule 50(b) of the Federal Rules of Criminal Procedure, or in the alternative, for a hearing to determine whether there are any excludable periods under Rule 5 of that Plan.

The Government's position on the motion is that (a) a hearing may well determine the existence of exceptional circumstances justifying the delay; (b) in the absence of a showing of exceptional circumstances, the defendants motion does not affect the first three counts of the indictment, insofar as those counts are based upon facts which are additional to, and independent of, the facts pleaded in the complaint of September 27, 1974; (c) as to the first three counts, the defendants must

show actual prejudice resulting from pre-indictment delay; (d) as to the defendant Palma Lombardi, the Rules for the Prompt Disposition of Criminal Cases for the Eastern District are inapplicable. The practical effect of a finding of the non-existence of exceptional circumstances is, we concede, the dismissal of five counts of the indictment (Counts Four through Eight), and the probable dismissal of Count One as to Rakofsky. We add, however, that such a finding does not bar the Government from proceeding on the remaining counts for the reasons outlined above, namely, the existence of additional evidence to establish the charges contained therein, and the remoteness in time and circumstance of that evidence from the charges levied in the complaint, absent a showing of prejudice by the defendants resulting from pre-indictment delay.

* * *

(a) The Government is prepared to offer the following facts bearing on the existence of exceptional circumstances:

(1) the alleged debtor, Joseph Perrone, a relocated witness, after encountering difficulties in adjusting to his relocation, left the supervision of the United States Marshals and remained incommunicado for a period of several months, beginning in late December, 1974;

(2) witnesses were apparently visited by one or more of the defendants or their Agents during the conduct of the grand jury investigation preceding the instant indictment,

and conversations occurred regarding the method in which they were to testify;

(3) the defendant Cavitolo warned Daniel Gilberti, named in the indictment as a co-conspirator, against co-operating with the Federal Bureau of Investigation in its investigation.

(4) the said Daniel Gilberti departed the State of New York approximately in January, 1974. Efforts were undertaken by the Federal Bureau of Investigation to determine his whereabouts, and on June 3, 1974, he was served with a subpoena to appear before a Federal Grand Jury and given an advance of funds to facilitate his return.

(5) After returning to New York, Gilberti visited the defendant Cavitolo. During a consensually recorded conversation, Cavitolo tenders money to Gilberti to leave the jurisdiction.

(6) In a consensually recorded conversation between the defendant De Fillippo and Gilberti, De Filippio admits that witnesses had been contacted prior and subsequent to their grand jury appearance.

(7) In consensually recorded conversations between at least three of the witnesses and Gilberti, they admitted withholding evidence from the grand jury.

* * *

While each of the above circumstances, standing alone, may not constitute an exceptional circumstance, it is our position that in the aggregate, a sufficient basis is created

for invoking the tolling provisions of Rule 5(h) of the Prompt Disposition Plan. We note, further, that it is not necessary for the Government to request an extension under Rule 5(h) prior to the expiration of the initial six-month period. United States v. Rollins, 475 F. 2d 1108 (2d Cir. 1973).

* * *

(b) Count One charges the defendants Cavitolo, De Filippo, Rakofsky and Lombardi with conspiracy to make extortionate extensions of credit between April, 1972 up to the date of indictment; Count Two charges DeFilippo with financing extortionate extensions of credit during the same period; Count Three charges Cavitolo with financing extortionate extensions of credit from about May, 1973 to August, 1973. A cursory reading of the indictment demonstrates that these counts, as pleaded, materially differ from the remaining counts, all of which charge Section 894 violations in connection with attempts to collect a debt from Joseph Perrone. We concede that, as to Count One, insofar as the defendant Rakofsky is concerned, Rule 4 may bar the Government from proceeding on that count, absent additional evidence establishing his involvement in a conspiracy or conspiracies prior to the date of events outlined in the complaint. However, as to the remaining defendants, while the evidence may overlap, there is an apparent lack of identity between the matters pleaded in the earlier counts and those charged in the Perrone counts. The inclusion of Rakofsky in Count One does not, of necessity, make the conspiracy alleged

therein identical with the Perrone conspiracy alleged in Count Four. Different violations are apparent on their face. A conspiracy can have more than one object or violate more than one statute. The defendants are merely charged in the complaint with making one extortionate extension of credit and conspiring to do so. Count One charges the defendants with conspiring with each other over a two and one half year period to make extortionate extensions of credit. While the Government's evidence, assuming it were admissible, would include the Perrone transaction, it would by no means be limited to those facts. The defendants summarily state that the indictment charges "the same alleged criminal conduct charged in the underlying complaint". This simply is not the case. Further, while Rule 8 permits joinder of offenses arising from a "common scheme or plan", to utilize Rule 8 as an argument for dismissing an indictment alleging a broader time sequence and a series of events independent of that alleged in the complaint is misleading. Were the Government to be barred from using evidence of the Perrone transaction, it would still have ample evidence to establish the charges in Counts one, two and three. That is so because each count of the indictment charges a separate offense as it must. and under the cases, is regarded as if it was a separate indictment. See Dunn v. United States, 284 U.S. 390 (1932); United States v. Andreadis, 366 F. 2d 423 (2d Cir. 1966), cert. den. 379 U.S. 962. And there is no prohibition against the use of the same evidence to support more than one count, if there is also evidence aliunde to override a claim of duplicity. Compare: United States v.

Shavin, 287 F. 2d 647 (7th Cir. 1961) where the court held that reference in one count to matter in another count which is defective or rejected does not render the former also defective. Rule 4 itself clearly deals with "the formal charge upon which the defendant is to be tried" as the basis for invoking the six-month period. Cases such as United States v. Kaye, offer no basis for expanding the rule to include charges not pleaded in the initial complaint (although implicating the same statutes), and are not helpful in clarifying the issue. Indeed, in Hilbert v. Dooling, 476 F. 2d 355 (2d Cir. 1973), cited by the defendants, the court seems to imply in footnote two that if a superseding indictment is filed charging additional counts based on transactions other than those originally charged (comparable to the filing of an indictment following the lodging of a complaint alleging different facts or fewer transactions) Rule 4 dismissal may not be warranted. Compare: United States v. Haim, 218 F. Supp. 922, 929 (S.D.N.Y. 1963) on the issue of what an indictment actually charges: the Court stating the fact that while an indictment cites only one statute and not another is not conclusive on the number of offenses included because the statute on which an indictment is founded must be determined by the facts charged and not by the statutory reference. The Government's position here is that, in determining what effect the filing of an earlier complaint has on an indictment subject to Rule 4 dismissal, it is the facts charged that must be considered in their entirety, and as they

bear on each count. (In this light, the Government is prepared to submit the grand jury minutes to the Court for in camera inspection so that it can determine whether counts one through three are based on facts not alleged in the September 27, 1974 complaint.)

An analogy to those cases arising under the doctrine of collateral estoppel may be of some help, where courts are faced with the difficult task of determining whether an issue of ultimate fact has been determined in one proceeding which conclusively bars the retrial of an issue subsequently raised in a separate proceeding under the double jeopardy clause. In Yates v. United States, 354 U.S. 298 (1957), the Supreme Court, in determining whether or not to apply the doctrine of collateral estoppel, stated at pages 337 and 338:

"... the doctrine of collateral estoppel does not establish any such concept of 'conclusive evidence' as that contended for by the petitioner. The normal rule is that a prior judgment need be given no conclusive effect at all unless it establishes one of the ultimate facts in issue in a subsequent proceeding. So far as merely evidentiary or 'mediate' facts are concerned, the doctrine of collateral estoppel is inoperative."

If our position is correct, namely, that Rule 4 does not affect the efficacy of the first three counts (except perhaps as to Rakofsky), then all claims of a violation of the defendants rights to a speedy trial must be viewed in the light of those cases dealing with pre-indictment delay. Absent a showing

of actual prejudice or purposeful delay by the Government to win a tactical advantage, we submit, the indictment should be sustained. United States v. McClure, 473 F. 2d 81 (D.C. Cir. 1972); United States v. Emory, 468 F. 2d 1017 (8th Cir. 1972); United States v. Edwards, 458 F. 2d 1352 (9th Cir. 1972); United States v. Griffin, 464 F. 2d 1352 (9th Cir. 1972); Northern v. United States, 455 F. 2d 427 (9th Cir. 1973).

(d) As to the defendant Lombardi, we submit that Rule 4 is not applicable, and that, under the above-cited cases, she has the burden to establish actual prejudice.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA	:	75-CR-261
- against -	:	
ANDREW CAVITOLLO, a/k/a "Andy Zac"	:	
Cavitolo, ANTHONY DeFILIPPO, JOEL	:	
RAKOFISKY, and PALMA "PAT" LOMBARDI,	:	
Defendants.	:	July 1, 1975

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Appearances:

HON. DAVID G. TRAGER
United States Attorney
Attorney for United States of America

By: JAMES W. DOUGHERTY, ESQ.
Special Attorney
of Counsel

LaROSSA, SHARCEL & FISCHETTI, ESQS.
Attorneys for Defendant Cavitolo

By: JAMES M. LaROSSA, ESQ.
GERALD L. SHARGEL, ESQ.
of Counsel

GUSTAVE H. NEWMAN, ESQ.
Attorney for Defendant DeFilippo

J U D D, J.

MEMORANDUM AND ORDER

Two defendants have moved to dismiss an indictment for conspiracy and extortion, 18 U.S.C. §§ 892, 893 and 894, on the ground that the government has failed to comply with this court's Plan for Achieving Prompt Disposition of Criminal Cases.

Facts

Defendants Cavitolo, DeFilippo and Rakofsky were arrested on September 27, 1974 on a complaint which charged them with using extortionate methods to collect extensions of credit to one Joseph Anthony Perrone. It was alleged that Perrone had been assaulted by defendants Cavitolo and DeFilippo on July 11, 1974, in connection with an outstanding debt, and had to be hospitalized and treated for an infection resulting from cuts sustained during the assault. The complaint referred to other threats of violence to Mr. Perrone and to consensually monitored conversations between Perrone and defendant Cavitolo in August 1974, which included serious threats of violence. A search warrant was executed on Mr. Cavitolo's premises on September 26, 1974 and resulted in the seizure of pay envelopes bearing Mr. Perrone's name.

The indictment was not filed until April 2, 1975, more than six months after the date of arrest. Defendants were arraigned on April 10, 1975. Their counsel requested time until May 9th to prepare motions. The motion for dismissal was actually filed on May 8, 1975, noticed for May 23, 1975, and was argued on June 6, 1975.

The government presented a double barreled argument first that the delay was excusable because Mr. Perrone was unavailable as a witness during a considerable portion of

time between the arrest and the indictment and second, that the indictment covers matters not mentioned in the complaint.

The court heard the testimony of the case agent concerning some of the reasons for delay. At the request of the parties, the court has also examined all the grand jury testimony supporting the indictment.

Joseph Perrone testified before the grand jury on September 3, 1974. After his grand jury testimony, the witness Joseph Perrone was relocated for the protection of himself and his family. He voluntarily withdrew from the program in December 1974 and could not be located until April. The FBI agent in charge of the case testified that Mr. Perrone became a relocated witness in November 1974 and that his status changed in late December of 1974 or early January 1975. At that time he signed a form of voluntary detachment. The agent had not been informed by the United States Marshal of the place of relocation. He expected Mr. Perrone to get in touch with him and did not make an extensive effort to reach him at the time. When he was informed of the area of relocation, he called the resident agent at the end of February, and located Mr. Perrone through his mother-in-law in early April. The case agent testified that he did not know the mother-in-law's address before February or March, although he had taken the names and addresses of Perrone's relatives while Mr. Perrone was

cooperating.

Almost all the grand jury testimony concerning Mr. Cavitolo was heard during September 1974. There was additional testimony during December 1973 about borrowings from a Mr. Gilberti, who may have been a partner of Mr. Cavitolo, and about borrowings from Mr. DeFilippo. One significant piece of corroborative evidence with respect to Messrs. Cavitolo and DeFilippo was received in January 1975. The next testimony was the testimony of Agent Domroe on April 2, 1975 concerning the taped conversation between Mr. Perrone and Mr. Cavitolo and a similar conversation with Mr. Rakofsky. It appears, however, that these tapes were available in September 1974.

The complaint alleges a conspiracy extending from April 1972 up to and including the date of filing the indictment. However, five of the eight counts relate to substantive violations between May 1973 and August 1974, and specifically relate to the Perrone transaction described in the complaint. Thus portions of three counts (1, 2, and 4) might survive if the delay in the indictment violates the six-months rule.

The "Speedy Trial" Rule

Rule 4 of this court's Plan for Achieving Prompt Disposition of Criminal Cases, effective April 1, 1973, required that the government be ready for trial within six

months from the date of arrest on pain of having the indictment dismissed. Rule 5 excludes various periods from the times specified under Rule 4. The pertinent portions are

(c) The period of time during which:

(i) evidence material to the government's case is unavailable, when the prosecuting attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will become available within a reasonable period . . .

. . .

(h) other period of delay occasioned by exceptional circumstances.

Discussion

The period of delay from September until January was apparently occasioned by the prosecution's attempt to obtain additional evidence which might strengthen its case. It had clearly shown probable cause for an indictment by January 13, 1975, when the last significant corroborative evidence was submitted to the grand jury. However, Mr. Perone's absence at that time would have seriously jeopardized the trial of the action. Since he was not in custody and his address was unknown, he was "unavailable." The FBI agent and the prosecuting attorney might have made more urgent efforts to locate him before they did, but the requirement of "due diligence" does not mean that the government agents must earn an "A" for effort in order to claim the benefit of the

exclusion. There was ground to believe that Mr. Perrone might surface again. Within a reasonable interpretation of "due diligence," the court is satisfied that the period of Mr. Perrone's absence should be excluded from the six-months period.

Perhaps the Marshal in the area of relocation was at fault for permitting Mr. Perrone to detach himself from the relocation program, without arresting him as a material witness, but that is not the sort of mistake of judgment which should terminate a criminal prosecution for a serious crime.

The period of Mr. Perrone's absence, from late December to mid-April, is approximately 105 days. If that period is excluded, and the period granted for the making of motions and the time required by the court for the decision is excluded, as permitted by Rule 4(a) of the Plan, a government notice of readiness at this time would conform with the speedy trial rule.

Defendants rely on United States v. Flores, 501 F.2d 1356 (2d Cir. 1974), for the contention that Perrone was not "unavailable" within the meaning of the Rule. The Flores case is different. There the agent was in contact with the witness, but the witness refused to testify. It was not until almost eight months after the appellant's arrest in the Flores case that the witness actually appeared before the


grand jury and the indictment was returned.

The six-months limit is not an outside limit, for as the court said in United States v. McDonough, 504 F.2d 67 (2d Cir. 1974):

There are any number of "[e]xcluded periods" under Rule 5 of the Plan on which the Government may base a claim to toll the period, but the period itself is fixed, clearly, sharply and without qualification, at six months.

A witness' voluntary detachment from a relocation program is certainly an unexpected event. Even if the agent be faulted for not exercising the utmost diligence in locating him, the circumstances of this case justify exclusion of the period of his absence as a "period of delay occasioned by exceptional circumstances."

It is ORDERED that the motion to dismiss the indictment be denied.


U. S. D. J.

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA,

v.

No. 75 CR 261 (OGJ)

ANDREW CAVITOLLO, et al.,

Defendants.

-----X

S I R S:

PLEASE TAKE NOTICE that Andrew Cavitolo hereby appeals to the United States Court of Appeals for the Second Circuit from a Judgment of Conviction entered against him before the Hon. Orrin G. Judd, United States District Judge for the Eastern District of New York, on June 7th, 1976 wherein the defendant was convicted of one count of making extortionate extensions of credit in violation of Title 18, United States Code, Sections 893 and 2; and two counts of conspiring to use extortionate means to collect extensions of credit in violation of Title 18, United States Code, Section 894(a). Defendant was sentenced upon said conviction to one (1) year imprisonment with service

of 60 days on each count in a jail-type institution. Additionally, defendant was fined in the sum of \$5,000.

Dated: New York, New York
June 7th, 1976

Yours, etc.

LA ROSSA, SHARGEL & FISCHETTI
Attorneys for Defendant Cavitolo
Office and Post Office Address
522 Fifth Avenue
New York, New York 10036
687-4100

By: _____
JAMES M. LA ROSSA
A Member of the Firm

TO:

HON. DAVID G. TRAGER
United States Attorney
Eastern District of New York
United States Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Defendant's Home Address is:
2870 Stillwell Avenue
Brooklyn, New York

Service of three ③ copies of the within
is admitted this 3rd day of August 1976

United States Attorney for the Eastern District
of New York
Attorney for the Appellee

RECEIVED
U.S. ATTORNEY

AUG 13 12 11 PM '76

EAST. DIST. N.Y.

Paula
Johnson